

Cover letter from the Governor of the State
requesting program approval.

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Arizona CWA 404 Program Description

I. Introduction

- Statement of Purpose to Adopt the 404 program
- CWA 404 Program
- CWA 404 Assumption Requirements
- Guidance and Past State Actions
- ADEQ Actions to Assume the Program in Compliance with Requirements
 - Brief Description
 - 40 CFR 233 and 40 CFR 230 and CWA 404
 - Statutes, rules, policies, agreements, forms, templates, licensing time frames, and internal processes and structure are subject to change and improvement, in accordance with federal and state law. (If statutes or law change, I expect the state may need to submit those changes to EPA for approval as a revision to the state program.) This program description is merely a snapshot of Arizona's program at this particular time to demonstrate its ability to effectuate the CWA 404 program.
 - Legislation Adoption
 - Initial Stakeholder Process Description
 - ADEQ Rule Drafting Process
 - Formal Rulemaking Process
 - Agreements
 - Templates, Permit Forms, Policies (? If any, Florida is doing a handbook, sounds like a good idea)
 - Technical Capacity, Resources, Funding
- Table of Rules, Statutes (and Policies?), Required Agreements (and other agreements?) Submitted for EPA Approval

II. Scope and Structure of the Program

A. Environmental Regulation in Arizona

1. Administrative Structure in Arizona

- How administrative agencies are set up and fit into Arizona law
- How ADEQ is set up, what is the general organizational structure from Governor to WQD director, and sections/units, but indicate that the structures are subject to change
- How administrative agencies function – specifically how ADEQ functions and how agency and statutes generally function

2. General Statutory, Permitting, and Rule Structure for the State

- Title 41 permitting, rulemaking, and final agency actions appeals structure
- Permitting
- Rulemaking

3. Administrative and Judicial Review Structure in Arizona – Specific to Water Quality

- Final Agency Actions
- Water Quality Appeals Board (applicable to.....)
- Jurisdictional Determinations (how would these be appealed?)

B. Statutory structure of 404 Program

- Describe history of when it was passed,
- what it allowed the agency to do (allocated so that state “may” adopt a program, lay the groundwork).
- Describe all the changes made and the statutory structure of the 404 program, including the authorities it allows for rulemaking and enforcement.

C. Rule Structure of 404 Program

1. CWA 404 Permitting Program – Likely in A.A.C. Title 18, Chapter 9, Article 8

- a) *Brief description*
- b) *Definitions*
- c) *Scope of regulation*
- d) *Exemptions BMPs*
- e) *404(b)(1) guideline requirements fulfilled*
- f) *Permit process rules*
- g) *Enforcement rules, if helpful to elucidate anything*
- h) *Confidentiality (233.3) (rule?)*
- i) *Conflict of Interest (233.4) (rule?)*

2. Fees – A.A.C. Title 18, Chapter 14

- a) *Brief description*
 - This section is not being submitted for approval, but rather is described and presented to provide context and demonstrate our ability to collect fees for the program.
- b) *Definitions*
- c) *Fee tables*

3. Licensing Timeframes – A.A.C. Title 18, Chapter 1, Article 5

- a) *Brief Description and explanation of statutory requirements*
 - This section is not being submitted for approval, but rather is described and presented to provide context and explanation for the full rulemaking.

b) Table showing timeframes for JDs, general, individual permits – table

D. Geographical Scope of Assumption

1. Refer to Corps agreement and federal law jurisdiction over tribal lands
2. Show map - Exclude Colorado river and adjacent wetlands per assumable waters subcommittee, and tribal lands
3. Jurisdictional Determinations

E. AZ404 Permits

1. Scope of Activities Regulated (CWA 404 Regulated Activities)
2. Exemptions
 - a) Best Management Activities for Exemptions under CWA § 404(f)(1)(E)
3. General Permits
 - including requirements pursuant to CWA 404 and 40 CFR §§ 233.21 & 233.23)
4. Individual Permits
 - Including permit Requirements Pursuant to CWA 404 & 40 CFR 233.23
5. Emergency Permits (including requirements pursuant to 40 CFR 233.21)
 - Including permit Requirements Pursuant to 40 CFR 233.22
6. Permit Review Criteria, Decisions, Issuance, Modification
 - a) Application Requirements pursuant to 40 CFR 233.30
 - b) Description of: permit templates and forms
 - c) Discuss permit decisions
 - (1) requirements and 404(b)(1) guidelines (refer to rule) and
 - (2) 40 CFR 233.34 (permit decision requirements) and signature (244.37)
 - (3) 40 CFR 233.24 (Permit conditions, refer above)
 - (4) EPA, Corps, FWS review on non-waivable permits or pursuant to agreement
 - Wording of this title depends on what the agreements include, but at a minimum this will address non-waivable permits under 233.54
 - d) Permit Modifications, Suspension, Revocation pursuant to 40 CFR 233.36
 - (including requirements pursuant to 40 CFR 233.36)

Commented [HH1]: General permits that are very similar to NWP would still be state issued general permits, and we would still consider those general permits. There are a couple of confusing statements in the rule:

e.g.: note that states must be able to ensure compliance with existing permit conditions, and reporting, monitoring or PCN requirements. 40 CFR 233.21

Also, in the Purpose and Scope, EPA says that “[a] State’s decision not to assume existing Corps’ general permits does not constitute a partial program. The discharges previously authorized by general permit will be regulated by State individual permits.” 40 CFR 233.1(b). I’m not sure why it is assumed in the rule that if a state does not assume general permits, then the facilities will be governed by individual permits. The logic is missing a step because a state may propose its own general permit rather than just individual permits.

The statute clearly identifies a “proposed general permit” as a permit type that is reviewable by the Administrator and subject to comment and objection. See 33 USC § 1344(j); see also 40 CFR § 233.51(b)(1). It would not make sense that the Administrator would require review of draft/proposed general permits if states may not issue their own general permits, possibly a modified version of the NWPs (potentially modifications such as for those conditions that a state cannot enact, like ESA section 7 or NHPA consultation under NHPA). Therefore, the statute contemplates that states may issue their own general permits, which is why EPA review is required.

Verification of this would be helpful.

7. Public Notice and Hearing Requirements
 - (including requirements pursuant to 233.32 and coordination requirements with other states under 233.31)

F. Enforcement Procedures

1. Compliance Tracking Methodologies
2. General Inspections and Enforcement Procedures
 - Also describe how, per 233.40, state shall maintain a program to ID persons subject to regulation who have failed to obtain a permit or comply with permit conditions
 - Also show inspection and investigation authority
3. Enforcement – Legal Action
 - a) *Administrative Action (State Authority – no court intervention necessary)*
 - b) *Civil Action (Court)*
 - c) *Criminal Action (Court)*
4. Federal Enforcement Requirements
 - a) *Federal Enforcement Inspection and Action requirements (including 233.40 & 41)*
 - b) *Audit Privilege Description*
 - c) *Confidentiality (40 CFR 233.3 and State statute for confidentiality)*
 - 40 CFR part 2 & 233.3(C)
5. EPA Coordination

G. Anticipated Coordination

1. With EPA
 - Memorandum as required by 233.13
 - Briefly describe classes and categories of permit applications for which EPA will and will not waive Federal review (as specified in §233.51).
 - Brief outline of review and objection procedures by EPA (233.50)
 - Grounds for objection
 - briefly describe the frequency and content of reports, documents and other information which the State may be required to submit to EPA and when, including annual report
 - Briefly describe submission date for the annual report. The State shall also Provisions addressing EPA and State roles and coordination with respect to compliance monitoring and enforcement activities
 - Potential ESA off-ramp procedures
2. With Corps
 - Memorandum as required by 233.14
 - A description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary.

- Procedures to transfer to the State upon program approval pending 404 permit applications for discharges in State regulated waters and other relevant information not already in the possession of the Director.
 - An identification of all general permits issued by the Secretary the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these general permits to the State, including procedures for the prompt transmission of relevant information, including support files for permit issuance, compliance reports and records of enforcement actions.
 - Potential ESA off-ramp procedures
3. With FWS?
 4. With Game and Fish?
 5. With Tribes?
 6. With SHPO?
- H. Annual Report (per 40 CFR 233.52)
1. Public notice procedures
 2. Content of report
 - ID problems encountered in administration and possible solutions
 - Cumulative impacts of program on integrity of state regulated waters
 - ID of areas of particular concern and/or interest w/in state
 - Number and nature of individual and general permits issued, modified, and denied
 - Number of violations identified
 - Number and nature of enforcement actions taken
 - Number of suspected unauthorized activities reported and nature of action taken
 - Estimate extent of activities regulated by general permits [what does "extent of activities" mean?]
 - Number of permit applications received but not yet processed
- I. Technical Capacity, Resources, and Funding
1. Anticipated Workload
 - Number of estimated dischargers/permits per year based on Corps data
 2. Number of Technical/Professional Positions Allocated to Program and How
 - Need based on data
 - Type based on data and discussions, in terms of position title, class code, grade, salary
 - Number thus hired
 - How Human Capital Will Be Allocated in the Today
 3. Estimated Operating Costs
 - Estimate costs based on anticipated staff and other resources needed (loosely based on Corps budget data, scaled for state costs)

4. Resources Available for 404 Program
 - a) *Water Quality Fee Fund (how used for other programs, too)*
 - b) *Fee structure (rules)*

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III. Attachments:::

Attorney General Certification (40 CFR § 233.12):

- that the laws and regulations of the State, or an interstate compact, provide adequate authority to carry out the program and meet the applicable requirements of this part
- shall cite specific statutes and administrative regulations which are lawfully adopted at the time the statement is signed and which shall be fully effective by the time the program is approved
- shall contain a legal analysis of the effect of State law regarding the prohibition on taking private property without just compensation
- In those States where more than one agency has responsibility for administering the State program, the statement must include certification that each agency has full authority to administer the program within its category of jurisdiction and that the State, as a whole, has full authority to administer a complete State section 404 program.

Commented [HH2]: [contemplates that rules/statutes may not be final, yet]

Commented [HH3]: What does this look like? is there a similar requirement in other EPA programs? Audit privilege has been a bit of a process....Does EPA have an idea as to what an acceptable analysis looks like?

Memorandum of Agreement with EPA (40 CFR § 233.13):

- Scope of program (JDs, Permits, Mitigation programs(?))
- Provisions specifying classes and categories of permit applications for which EPA will waive Federal review (as specified in §233.51).
- Notice and review procedures, timeframes, specific to the state, by EPA and the state
- Objection criteria
- Provisions specifying the frequency and content of reports, documents and other information which the State may be required to submit to EPA in addition to the annual report,
- provision establishing the submission date for the annual report.
- The State shall also allow EPA routinely to review State records, reports and files relevant to the administration and enforcement of the approved program.
- Provisions addressing EPA and State roles and coordination with respect to compliance monitoring and enforcement activities.
- Provisions addressing modification of the Memorandum of Agreement.

Memorandum of Agreement with Corps (40 CFR § 233.14)

- A description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary.
- Procedures to transfer to the State upon program approval pending 404 permit applications for discharges in State regulated waters and other relevant information not already in the possession of the Director.

- Identification of all general permits issued by the Secretary the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these general permits to the State, including procedures for the prompt transmission of relevant information, including support files for permit issuance, compliance reports and records of enforcement actions.
- Compensatory Mitigation Program agreements

Other Agreements Necessary for Submittal

Copies of all applicable state statutes and regulations, including those governing applicable administrative procedures (40 CFR § 233.10(f))

- How far does this go?

Permit templates, application forms, reporting forms

Policies Necessary (or that we wish to submit) for Submittal